IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BOWEN MEDICAL COMPANY, LTD.
A/K/A MASSACHUSETTS MEDICAL
COMPANY, LTD.,

ORDER

Plaintiff,

02-C-0170-C

v.

NICOLET BIOMEDICAL INC.,

Defendant.

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Presently before the court is plaintiff Bowen Medical Company, Ltd.'s motion for an extension of time to file a notice of appeal. Judgment was entered in favor of defendant on February 13, 2003. Plaintiff's notice of appeal as a matter of right was due on March 17, 2003. See Fed. R. App. P. 4(a)(1). A motion for an extension of time to file a notice of appeal must be made within 30 days of that deadline, which was April 16, 2003. See Fed. R. App. P. 4(a)(5). Plaintiff filed its request for an extension on April 16, arguing that good cause and excusable neglect justify granting the extension. See id. As one would expect, defendant opposes plaintiff's motion. Defendant contends that this is yet another example

of plaintiff filing untimely documents, which on its face does not rise to the level of either good cause or excusable neglect.

Fed. R. App. P. 4(a)(5) provides that "[t]he district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause." The advisory committee notes to the 2002 amendments provide that the good cause and excusable neglect standards have "different domains." See Advisory Committee Notes accompanying 2002 amendment to Fed. R. App. P. 4(a)(5(A)(ii) (citing Lorenzen v. Employees Retirement Plan, 896 F.2d 228, 231 (7th Cir. 1990)). Specifically, the advisory committee notes provide that "the excusable neglect standard applies in situations in which there is fault" but that "the good cause standard applies in situations in which there is no fault—excusable or otherwise." Id.

Plaintiff's counsel concedes that he received the authority to appeal this court's decision on February 26, 2003. However, he avers that in his rush to leave the office to meet clients at a University of Wisconsin basketball game, he "did not immediately docket the appeal deadline." Although plaintiff's counsel points to other subsequent events (a vacation in Mexico the week of March 3, an illness on March 10 and 11 and a back injury on March 16), I am not persuaded that these subsequent events caused the deadline to pass

unnoticed because these events caused only intermittent absences from the office. In any event, in either situation there is fault. Thus, the excusable neglect standard applies.

In Pioneer Investment Services Co. v. Brunswick Associates L.P., 507 U.S. 380 (1993), the Supreme Court addressed the question of excusable neglect. The Court granted certiorari because some courts of appeals had required a showing that the movant's failure to meet the deadline was beyond its control, while others, such as the Court of Appeals for the Seventh Circuit, had adopted a more flexible approach. Id. at 387 n.3 (citing Lorenzen, 896 F.2d at 232-33). The Court adopted the more flexible approach, holding that excusable neglect could be found in situations in which delays were caused by "intervening circumstances beyond the party's control" as well as in situations involving "late filings caused by inadvertence, mistake, or carelessness." Id. at 388. "Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." Id. at 392. The determination whether neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." Id. at 395.

Citing Varhol v. National Railroad Passenger Corp., 909 F.2d 1557, 1561-62 (7th Cir. 1990), plaintiff argues that a finding of excusable neglect is warranted in this case under the doctrine of "unique circumstances." However, the unique circumstances doctrine cited

by the court of appeals in Varhol addressed the situation in which a would-be appellant that could have acted failed to do so because it was misled by something that the court had done. Id.; see also Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989) (unique circumstances doctrine "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done"). Plaintiff does not contend that this court misled it; thus, the unique circumstances doctrine is inapplicable. In fact, in Varhol, the court of appeals postulated that it would be a "patent abuse of discretion" for the district court to find excusable neglect in a situation in which "counsel simply forg[ot] on day thirty to file the notice [of appeal]." Varhol, 909 F.2d at 1564.

As defendant points out, (1) plaintiff's lawyer is not a sole practitioner but rather works for a well-regarded Madison law firm with more than 20 lawyers, 12 of whom practice in the area of litigation; (2) plaintiff's lawyer was in the office on several occasions between February 26 (the date of authority to appeal) and March 17 (appeal deadline); and (3) it takes very little time and effort to file a notice of appeal. The bottom line appears to be that plaintiff's counsel simply forgot to file the notice of appeal. Although I am sympathetic to plaintiff's counsel's plight, the reasons for failing to file a timely notice of appeal do not rise to the level of excusable neglect. It would be an abuse of discretion to conclude otherwise. If it is of any consolation (which it should be in terms of legal fees saved), plaintiff had little

to no chance of succeeding on appeal.

ORDER

IT IS ORDERED that plaintiff Bowen Medical Company, Ltd.'s motion for an extension of time to file a notice of appeal is DENIED.

Entered this 24th day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge